1931

* May 20, 21
* June 12

HIS MAJESTY THE KING (PLAINTIFF) APPELLANT;

AND

HENRY K. WAMPOLE & COMPANY, LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Special War Revenue Act, R.S.C., 1927, c. 179, ss. 86, 87—"Use" by manufacturer (s. 87d)—Goods distributed as free samples —Statement in special case—Effect of admission as to payment—Double taxation.

Defendant, in the course of its business as a manufacturer of pharmaceutical preparations, put up in special small packages and distributed free amongst physicians and druggists samples of its products, to acquaint them with their character and quality. The question in issue was whether or not defendant was liable for the consumption or sales tax in respect of the samples, under ss. 86 (*a*) and 87 (*d*) of the *Special War Revenue Act*, R.S.C., 1927, c. 179. Clause 4 of the special case agreed on stated that "the cost of producing such samples was paid by [defendant] as a necessary expense of business, and [defendant] in its books treated such expense as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles [defendant] has paid sales tax".

Held: The "use" by the manufacturer or producer of goods not sold, dealt with in s. 87 (*d*), includes any use whatever that he may make

(1) (1846) 6 Moore P.C. 1, at 9. (2) (1880) 5 App. Cas. 842, at 856.

* PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Cannon JJ.

of such goods, and is wide enough to cover their "use" for advertising purposes by their distribution as free samples, and would have covered their use in the present case, and the samples would have been subject to the tax, but for said clause 4 of the special case, which must be taken as an admission that the sales tax had already been paid upon the cost of producing the samples for free distribution, in which case to hold them now subject to the tax would involve double taxation, which the legislature should not be taken to have intended. Therefore the judgment of the Exchequer Court (Maclean J.), [1931] Ex. C.R. 7, holding defendant not liable for the tax claimed, was affirmed in the result, but not for the reasons therein given. Newcombe J. dissented as to the effect of said clause 4, and would have allowed the Crown's appeal.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the defendant (respondent) was not liable to pay a consumption or sales tax, under the *Special War Revenue Act,* R.S.C., 1927, c. 179, ss. 86 (*a*) and 87 (*d*), on or in respect of certain samples of its products put up for distribution and distributed.

A special case was agreed on between the parties for the opinion of the Exchequer Court, which read as follows:

"1. The defendant is an incorporated company having its head office in the town of Perth, in the province of Ontario, and its chief executive office at the town of Perth, in the province of Ontario.

"2. The defendant is and was during the period hereinafter referred to engaged in the manufacture and sale of drugs and pharmaceutical supplies, and as such was the holder of a licence under subsection 6 of section 19BBB of the *Special War Revenue Act, 1915* (now section 95 of the *Special War Revenue Act,* R.S.C., 1927, chapter 179).

"3. The defendant in the course of its business as a manufacturer of pharmaceutical preparations put up in special small packages, samples of its products to be distributed amongst physicians and druggists as specimen or trial samples for the purpose of acquainting the physicians and druggists with the character and quality of the aforesaid pharmaceutical supplies. The said samples were, as a part of a well defined policy and in the ordinary course of business, distributed free of charge amongst the said physicians and druggists.

(1) [1931] Ex. C.R. 7.

1931

THE KING v. HENRY K. WAMPOLE & CO., LTD.

"4. The cost of producing such samples was paid by the company as a necessary expense of business, and the company in its books treated such expense as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company has paid sales tax.

"5. There has been assessed, imposed and levied on the defendant a consumption or sales tax of $139.75 in respect of the said samples mentioned in paragraph 3 hereof.

"6. All acts have been done and all times have elapsed to entitle His Majesty the King to payment by the defendant of the sum of $139.75 and interest as hereinafter mentioned, if this Honourable Court shall hold, on the facts as above set out, that the defendant is liable to pay a consumption or sales tax on the samples aforesaid under and by virtue of section 19BBB, subsection 1, and subsection 13 (*d*) of the *Special War Revenue Act, 1915* (now section 86*a* and section 87*d* of chapter 179 aforesaid).

"7. The question for the opinion of this Honourable Court is: whether on the facts as above stated and admitted herein, the defendant is liable to pay to His Majesty the King the consumption or sales tax on or in respect of the samples referred to in paragraph 3.

* * * * *"

Leave to appeal from the judgment of Maclean J. (1) was granted to the Attorney-General of Canada by a judge of the Supreme Court of Canada.

I. F. Hellmuth, K.C., and *F. P. Varcoe* for the appellant.
H. A. O'Donnell for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Rinfret, Lamont and Cannon JJ) was delivered by

ANGLIN, C.J.C.—I was, at the hearing of this appeal, strongly of the view that the sample goods in question were subject to the tax sought to be collected in this case. My construction of clause (*d*) of section 87 is that the "use" by the manufacturer or producer of goods not sold includes

(1) [1931] Ex. C.R. 7.

any use whatever that such manufacturer or producer may make of such goods, and is wide enough to cover their "use" for advertising purposes by the distribution of them as free samples, as is the case here. I am, therefore, with great respect, unable to agree in the reasons assigned by the learned trial judge for dismissing this petition (1).

But, in clause 4 of the Special Case, we find the following statement :

> 4. The cost of producing such samples was paid by the company as a necessary expense of business, and the company in its books treated such expense as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company has paid sales tax.

It is obvious to me that it cannot have been the intention of the Legislature to tax the same property twice in the hands of the manufacturer. Having regard to the admission of paragraph 4, above quoted, such double taxation would ensue were we to hold the samples here in question to be now subject to the consumption or sales tax, it being there admitted that the cost of producing such samples is included in the

> cost of production of articles manufactured and sold, in respect of which * * * the company has paid sales tax.

If the cost or value of these goods used as samples has already been a subject of the sales tax in this way, it would seem to involve double taxation if they should now be held liable for sales tax on their distribution as free samples. But for the admission of paragraph 4, however, I should certainly have been prepared to hold that the "use" by the company of goods manufactured by it as free samples for advertising purposes is a "use" within clause (*d*) of section 87 of the *Special War Revenue Act*, R.S.C., 1927, ch. 179.

If it was not intended by paragraph 4 to make an admission that the sales tax had already been paid upon the cost of producing the samples for free distribution, that paragraph in the Special Case is wholly irrelevant and most misleading and I cannot understand the Crown assenting to its insertion unless it intended thereby to make the admission I have stated.

For these reasons the appeal fails and must be dismissed with costs.

(1) [1931] Ex. C.R. 7.

1931

THE KING
v.
HENRY K. WAMPOLE & CO., LTD.

NEWCOMBE, J. (dissenting).—I am in agreement with my lord and my learned brethren as to the interpretation of the charging section; but I am not persuaded that the facts admitted by clause 4 of the case constitute payment, or operate to relieve the respondent company of its liability for the tax. If the sale price of the goods were increased by the company's method of book-keeping, I do not doubt that the fact would have been stated.

I see nothing in the case to justify a finding of double taxation, or that the tax upon the samples, to which, in the view of the Court, the Government was entitled, has been paid; and I would, therefore, allow the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondent: *Stewart, Hope & O'Donnell.*